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ATTORNEYS FOR PLAINTIFFS

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

**JAMES COLUCCI and KIMBERLY S.
SETHAVANISH, on behalf of themselves
and all others similarly situated,**

Plaintiffs,

v.

**ZONEPERFECT NUTRITION COMPANY,
a Delaware corporation,**

Defendant.

Joseph N. Kravec, Jr. (admitted *pro hac vice*)
Maureen Davidson-Welling (*pro hac* to be filed)
Wyatt A. Lison (*pro hac* to be filed)

STEMBER FEINSTEIN DOYLE

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CASE NO.: CV 11-4561 SC

CLASS ACTION

**PLAINTIFFS' NOTICE OF VOLUNTARY
DISMISSAL**

DEMAND FOR JURY TRIAL

1 Plaintiffs, by their attorneys, hereby voluntarily dismiss their claims against Defendant
2 ZonePerfect Nutrition Company (“ZonePerfect”) without prejudice pursuant to Fed. R. Civ. P.
3 41(a)(1). ZonePerfect has not served an answer or motion for summary judgment and this dismissal
4 will not bind any member of the proposed class, and thus Plaintiffs do not need a court order to
5 dismiss their claims.

6 Plaintiffs are dismissing their federal action and re-filing their claims in California state court
7 for the purpose of preserving their claims in the event federal jurisdiction does not exist under the
8 Class Action Fairness Act (“CAFA”), 28 U.S.C. §1332(d). CAFA requires the matter in controversy
9 to exceed \$5 million, exclusive of interest and costs, for class members collectively. 28 U.S.C.
10 §1332(d)(2). When Plaintiffs filed their action originally, they were confident that the amount in
11 controversy exceeded \$5 million based on ZonePerfect’s nationwide sales of its nutrition bars and
12 based on the ability to get a nationwide class certified for ZonePerfect’s uniform conduct of labeling
13 its nutrition bars as being “All Natural” despite containing non-natural ingredients.

14 After filing Plaintiffs’ action, the Ninth Circuit Court of Appeals held that nationwide
15 certification of claims alleging false advertising under California law may not be appropriate,
16 depending on a fact-specific state-by-state choice of law analysis. *See Mazza v. American Honda*
17 *Motor Co., Inc.*, 666 F.3d 581 (9th Cir. 2012)(*en banc* review denied on March 16, 2012). Based on
18 *Mazza*, Plaintiffs are now uncertain whether the amount in controversy exceeds \$5 million for the
19 class as it will depend on the size of any class certified. The amount in controversy for the class
20 might exceed \$5 million if the Court certifies a nationwide class or a large enough multi-state class.
21 However, if the class is limited to a small number of states or a state-wide class, damages might not
22 meet this Court’s jurisdictional requirements under CAFA. If the Court finds it does not have
23 jurisdiction under CAFA after a class is certified, it may not have the power to adjudicate the claims
24 of the certified class.

25 Given this uncertainty, and out of an abundance of caution, Plaintiffs are dismissing their
26 claims in federal court and refiling their action in state court. If ZonePerfect removes Plaintiffs’
27 state court action, Plaintiffs do not and will not object to the action being assigned to Judge Conti for
28 the purpose of continuing this litigation. However, should the Court find it does not have

jurisdiction under CAFA for the removed case due to the size of any class certified based on the amount in controversy, Plaintiffs will have ensured theirs and the class' claims in that the action can then be remanded to state court for further proceedings at that time rather than being dismissed.

Dated: April 27, 2012

**STEMBER FEINSTEIN DOYLE
PAYNE & KRAVEC, LLC**

By: s/Joseph N. Kravec, Jr.
Joseph N. Kravec, Jr.
(admitted *pro hac vice*)

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Maureen Davidson-Welling (*pro hac* to be filed)
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PROOF OF SERVICE

STATE OF PENNSYLVANIA)
) ss.:
COUNTY OF ALLEGHENY)

I am employed in the County of Allegheny, Commonwealth of Pennsylvania. I am over the age of 18 and not a party to the within action. My business address is 429 Forbes Avenue, Allegheny Building, 17th Floor, Pittsburgh, Pennsylvania 15219.

On April 27, 2012, I served the document(s) described as:

PLAINTIFFS' NOTICE OF VOLUNTARY DISMISSAL

[X] BY ELECTRONIC TRANSMISSION USING THE COURT'S ECF SYSTEM:

I caused the above document(s) to be transmitted by electronic mail to those ECF registered parties listed on the Notice of Electronic Filing (NEF) pursuant to Fed.R.Civ.P. 5(d)(1) and by first class mail to those non-ECF registered parties listed on the Notice of Electronic Filing (NEF). *"A Notice of Electronic Filing (NEF) is generated automatically by the ECF system upon completion of an electronic filing. The NEF, when e-mailed to the e-mail address of record in the case, shall constitute the proof of service as required by Fed.R.Civ.P. 5(d)(1). A copy of the NEF shall be attached to any document served in the traditional manner upon any party appearing pro se."*

Executed on April 27, 2012, at Pittsburgh, Pennsylvania.

/s Joseph N. Kravec, Jr.
Joseph N. Kravec, Jr.